Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

No. 71-1153

PHYLLIS N. FIELDS, Individually and as Guardian of Janet Marie Fields, Lori Alison Fields, and Jan Scott Fields - - Petitioners

versus

THE TRAVELERS INSURANCE COMPANY;
BARBARA G. FIELDS, Individually and as Administratrix of the Estate of Jan A. Fields, Deceased; and
CHARLES P. WAGNER, Administrator of the Estate of Jan A. Fields - - - Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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v.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment herein of the United States Court of Appeals for the Sixth Circuit entered December 13, 1971.

OPINIONS BELOW

The opinion of the District Court for the Eastern District of Kentucky, Eastern Division, is reported in 323 F. Supp. 387 and is printed in Appendix A hereto. The opinion of the Court of Appeals is reported in 451 F. 2d 1292 and is printed in Appendix B hereto.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). Rule 19(1) of the Rules of the Supreme Court of the United States Provides:

> "1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion indicate the character of reasons which will be considered:
>
> '(a) . . .
>
> '(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision'."

QUESTIONS PRESENTED FOR REVIEW

1. The application of the Kentucky restoration statute to Ohio insurance contracts, so as to deprive the named beneficiary of the policy proceeds, constitutes a denial of due process to the named beneficiary,

who would receive the policy proceeds under Ohio law, and the Full Faith and Credit Clause may not be used to deprive the named beneficiary of her rights under those contracts of insurance.

2. Where the Sixth and Seventh Circuit Courts of Appeal have answered such a question as the above in directly opposite ways, this Court should grant certiorari, in order to determine the law and to resolve the important constitutional issues of this case.

CONSTITUTIONAL PROVISIONS AND STATUTES

1. Article IV, Section 1 of the Constitution of the United States:

> "Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other state. * * *"

2. Section 1 of Amendment XIV of the Constitution of the United States:

> "* * * [N]or shall any State deprive any person of life, liberty, or property, without due process of law. * * * *"

3. Kentucky Revised Code, Section 403.060(2):

> "Upon final judgment of divorce from the bonds of matrimony, each party shall be restored all the property, not disposed of at the beginning of the action, that he or she obtained from or through the other before or during the marriage and in consideration of the marriage."

4. Kentucky Revised Statute, Section 403.065:

> "Every judgment for a divorce from the bond of matrimony shall contain an order restoring any

property not disposed of at the commencement of the action, which either party may have obtained, directly or indirectly, from or through the other, during the marriage, in consideration or by reason thereof; and any property so obtained, without valuable consideration, shall be deemed to have been obtained by reason of marriage. The proceedings to enforce this order may be by petition of either party, specifying the property which the other has failed to restore; and the court may herein determine the same in a summary manner, after ten days' notice to the party so failing."

STATEMENT OF THE CASE

The decedent, Jan A. Fields (hereinafter referred to as Jan) and the Petitioner, Phyllis Fields (hereinafter referred to as Phyllis) were married on July 28, 1951. Janet Marie Fields, Lori Alison Fields and Jan Scott Fields (hereinafter referred to as the Children) were born of the marriage. On the 27th day of September, 1966, Jan and Phyllis were divorced by order of the Kenton Circuit Court, Commonwealth of Kentucky. The judgment contained the required "restoration clause", KRS 403.065. Also incorporated in that Kentucky divorce judgment was an agreement between Phyllis and Jan. This agreement disposed of various matters of property and child support. However, it failed to mention certain insurance policies upon the life of Jan, which policies were part of his fringe benefits as an employee of an Ohio paper manufacturing company. One of these policies of insurance was for the face amount of $100,000 and one for $3,000.

Jan had, prior to the divorce, designated Phyllis to be the beneficiary of these policies of insurance. At no time subsequent to this designation did Jan ever change the named beneficiary of these policies or evince any desire to do so, although ample time for him to do so had passed between the divorce and his death.

After Jan and Phyllis were divorced, Jan married Barbara. On September 9, 1969, Jan died in a plane crash in the State of Indiana, still an employee of the Ohio paper manufacturing concern and still married to Barbara; at the time of Jan's death, Phyllis was still named as beneficiary on the policies in question.

Barbara was appointed Administratrix of Jan's Estate, he being a resident of Hamilton County, Ohio for some time prior to his death; later Charles Wagner was appointed as Ancillary Administrator of Jan's Estate in Kentucky.

Jan died intestate and his estate will pass according to the laws of descent and distribution of the State of Ohio; the effect of rulings of the Courts below was to distribute the proceeds of the insurance policies to Jan's Estate, thereby depriving his intended beneficiary, Phyllis, of the funds.

In addition it need only be pointed out that both insurance policies provided that they were issued and delivered in the State of Ohio and were to be governed by the laws of Ohio.

The action commenced when the Travelers Insurance Company (hereinafter referred to as Travelers), instituted a Complaint in Interpleader in the Federal District Court for the Eastern District of

Kentucky. Named as parties were Barbara G. Fields (hereinafter referred to as Barbara), who is Ohio Administratrix of Jan's Estate, with the later addition of Charles Paul Wagner as Kentucky Ancillary Administrator of Jan's Estate. Also named as Defendant was Phyllis, the designated beneficiary, she being named both individually and as Guardian of the Children. Answer was filed by all parties Defendant. At a later date, Charles Wagner and Barbara moved for summary judgment, as did Phyllis and the Children. The District Court heard argument of counsel for the respective parties and on the 16th of December, 1970, granted summary judgment in favor of Barbara. Appropriate notice of appeal was filed by Phyllis and the Children, bringing the matter before the Sixth Circuit Court of Appeals.

In a decision filed December 13, 1971, the Court of Appeals affirmed the decision of the District Court.

Jurisdiction of the District Court was founded upon 28 U.S.C. Sec. 1335.

THE REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals should be reviewed for the following reason:

The Application of the Kentucky Restoration Statute to Ohio Insurance Contracts, So as to Deprive the Named Beneficiary of the Policy Proceeds, Constitutes a Denial of Due Process to the Named Beneficiary, Who Would Receive the Policy Proceeds Under Ohio Law, and the Full Faith and Credit Clause May Not Be Used to Deprive the Named Beneficiary of Her Rights Under Those Contracts of Insurance.

I.

Kentucky law is not applicable; the Full Faith and Credit clause is not applicable; Due process demands Ohio law apply.

It should first be clearly understood that Phyllis and the Children make no contention that Kentucky law is anything other than that expressed in *Bissell* v. *Gentry,* Ky., 403 S. W. 2d 15 (1966). The Kentucky Court of Appeals' interpretation of Kentucky Revised Statutes (hereinafter referred to as KRS) 403.065 and 403.060 means that in the usual divorce situation, policies of insurance, such as the ones involved in this case, are property to be restored to the appropriate party.

Nonetheless, Phyllis and the Children do not concede that the Kentucky statutes, or the Kentucky Court of Appeals' construction of those statutes, have any bearing upon the case at bar; indeed, they are totally irrelevant. It should be noted that none of the cases cited by the courts below truly disposes of the ques-

tions in this case, as none of those cases ever raises the question of the effect of the Kentucky restoration statutes upon contracts which, by their terms, are not to be governed by the laws of Kentucky. While Charles Wagner and Barbara eagerly contend that Kentucky law determines the various parties' rights, the contracts of insurance provide:

> "This policy is issued and delivered in the State of Ohio and shall be governed by the laws of that State."

It is the contention of Phyllis and the Children that Ohio law must determine who shall receive the *proceeds of the policies* and that Ohio law dictates that Phyllis receive those proceeds.

While the courts below seize upon the full faith and credit clause of the United States Constitution, it is clear that that clause does not apply to this case; in fact, the action of the courts below, in refusing to follow the requirements of Ohio law, violates the due process clause of the Fourteenth Amendment of the United States Constitution.

While the courts below rest their decisions upon what they suppose to be the demands of the full faith and credit clause of the United States Constitution, that provision of our Constitution does not require that contractual terms, freely arrived at by parties, be disregarded. Nor would it require that Ohio blindly disregard its own law as to an Ohio contract simply because one of the contracting parties may at one time have been a resident of another state. It is therefore

immediately apparent that the bare contention that the full faith and credit clause automatically answers all the questions in this case is equally bare of logic. This view is supported by the opinions of the United States Supreme Court in *Home Insurance Co.* v. *Dick,* 281 U. S. 397, 74 L. Ed. 926, 50 Sup. Ct. 338 (1930), and *Hartford Accident and Indemnity Co.* v. *Delta & Pine Land Co.,* 293 U. S. 143, 78 L. Ed. 1178, 54 Sup. Ct. 634 (1935).

In *Home Insurance Co.* v. *Dick,* the Court dealt with a fire insurance policy created, and to be performed, in Mexico. A suit on the contract was brought in Texas, but the Mexican corporation which issued the contract was never in Texas. The Texas court refused to impose limitations provided in the policy on the grounds that a Texas Statute forbade the imposition of such limitations. Of course, since the corporation involved was organized under the laws of a foreign country the full faith and credit clause did not apply; instead, the argument partly concerned the Fourteenth Amendment, which extends its protection to aliens. The Court noted that the Texas Statute purported to create rights and obligations, but the Court stated that Texas could not validly affect contracts which are neither made nor are to be performed, in Texas. Texas may not abrogate the rights of parties beyond its borders, having no relation to anything done or to be done within them. Consequently, it was held that the Texas Statute, as construed and applied, violated the due process clause of the Fourteenth Amendment of the United States Constitution.

Are not the principles of *Home Insurance Co.* precisely the same as those in this case? If Texas may not ". . . abrogate the rights of parties beyond its borders . . .", does Kentucky have a greater right? Clearly, just as the Texas Statute violated the due process clause of the Fourteenth Amendment, so do KRS 403.060 and 403.065 in this case.

In *Hartford Accident and Indemnity Co.* v. *Delta & Pine Land Co.* the Court again held that a state may not, on grounds of policy, ignore a right which has lawfully vested elsewhere, if the interest of the forum has but slight connection with the substance of the contract obligations. A legislative policy which attempts to draw to the state of the forum control over the obligations of contracts elsewhere validly consummated and to convert them for all purposes into contracts of the forum, regardless of the relative importance of the interest of the forum as contrasted with those created at the place of the contract, conflicts with the guarantees of the Fourteenth Amendment, the Court said. If the decision of the Courts below is Kentucky law, has not Kentucky, on the grounds of policy, ignored a right which has lawfully vested elsewhere? Have not the Courts below acted as legislators attempting to draw to the state of the forum control over the obligations of contracts elsewhere validly consummated? Again, these acts, condemned by the Court in *Hartford Accident and Indemnity Co.*, conflict with the guarantees of the Fourteenth Amendment.

These principles, enunciated with respect to the due process clause, also apply to arguments based upon the

full faith and credit clause. *Alaska Packers Assoc.* v. *Industrial Accident Commission of California,* 294 U. S. 532, 79 L. Ed. 1044, 55 Sup. Ct. 518 (1935). In *Alaska Packers Association* one Palma had gone to Alaska to work temporarily and was injured there. Alaska had a Workmen's Compensation Statute which provided certain benefits. However, Palma made a Workmen's Compensation claim in California under the California Statute. Limitations provided in the Alaska Workmen's Compensation Act were pleaded, since the parties had contracted that Alaska Law should apply, but the California court applied California law. With respect to the full faith and credit argument the Supreme Court said at page 546:

> "It has often been recognized by this Court that there are some limitations upon the extent to which a state will be required by the full faith and credit clause to enforce even the judgment of another state, in contravention of its own statutes or policy. [Citations omitted] [547]. In the case of statutes, the extra-state effect of which Congress has not prescribed, where the policy of one state statute comes into conflict with that of another, the necessity of some accommodation of the conflicting interests of the two states is still more apparent."

Alaska Packers Association stands for the proposition that the decision of the Courts below is not properly founded upon the full faith and credit clause. The Supreme Court recognized the necessity of some accommodation of conflicting interests of two states,

where the policy of one state statute should come into conflict with that of another. The need for that accommodation was never more apparent than in the case at bar. The conflicting interests here can best be accommodated by this Court holding that a contract which specifies that it is to be governed by the laws of Ohio must be governed by those laws.

We are not without guidance in asking the federal courts to make this decision, for the very District Court which decided this case also has decided one of the most significant cases dealing with a situation similar to that at bar. In *Morgan* v. *United States,* 315 F. Supp. 213 (E.D. Ky. 1969), a National Service Life Insurance policy was issued upon the life of one Morgan; his then wife, Martha Gunn Morgan, was named as beneficiary, with certain other persons named as contingent beneficiaries. This designation was in force at the death of the insured. The insured and Martha Gunn Morgan were divorced, and entered into a separation agreement and property settlement, which happened to be silent concerning the policy in question. Subsequently, the insured married the plaintiff, Fannalea Morgan, and they remained married until the insured's death.

In *Morgan,* the District Court took note of the statutorily required restoration clause in the Kentucky divorce decree and stated the question to be as follows:

> "Will a restoration provision in a divorce judgment rendered by a State Court, which adopts a property settlement which is silent as to the disposition of a National Service Life Insurance pol-

icy, operate as a bar to recovery by the first wife-beneficiary who remains the named beneficiary at the date of the veteran's death?"

The District Court then took note of the abundant Kentucky case law concerning restoration and insurance policies and conceded that if the state law controlled, the first wife could not prevail. Nonetheless, the District Court viewed the matter as one involving the "primacy of Federal law" and held that the policy provisions were controlling. The District Court took the position that the policy was a contract with the United States, its terms to be governed by Federal Statutes and Regulations in determining who is to receive the benefits of the policy.

Why is *Morgan* v. *United States* any different from this case? The Sixth Circuit Court of Appeals spoke in terms of "primacy of Federal law" but normally a federal court would be required to give due cognizance to state divorce judgments. Comity does not flow only between the states. Once this is understood, it is certain that the Kentucky courts would not hesitate to treat contracts created in another state differently where those contracts contain specific provisions removing themselves from the jurisdiction of Kentucky law.

This belief as to the probability of Kentucky Court of Appeals' approach in such a situation is not based on faith but upon precedent. Of particular interest is *Clarey* v. *Union Central Life Insurance Co.*, 143 Ky. 540, 136 S. W. 1014 (1911), and *Union Central Life*

Insurance Co. v. *Barnes,* 175 Ky. 364, 194 S. W. 339 (1917).

In *Clarey,* a resident of Wisconsin had had a policy of insurance issued to him by an Ohio company. Subsequently, the insured and his wife were divorced in Kentucky. The insured had named his first wife as beneficiary, and although he married again the first wife remained the named beneficiary. Upon the first wife instituting an action in a Kentucky court, the company pleaded time limitations contained in its policy, which limitations were clearly contrary to the public policy of Kentucky. It was equally clear that such limitations were valid under the laws of both Wisconsin and Ohio. Because of this, the Kentucky Court of Appeals held that it was immaterial whether the contract was to be governed by the laws of Wisconsin or of Ohio, for under either interpretation the plaintiff was barred; and, the court held that Kentucky law did not save the plaintiff's right to prosecute the action. The court held, at 1015:

> "As a general rule, a contract is governed and controlled by the laws of the place where it is made."

The Court considered its decision to be in harmony with the principle that the:

> ". . . proper law of the contract is presumed to be the law of the country where the contract is made (lex loci contractus); this presumption applies with special force when the contract is to be performed wholly in the country where it is made, or may be performed anywhere, but it may apply

> to a contract partly or even wholly to be performed in another country. In other words, the proper law of a contract is the law of the place where it is made. This law governs * * * not only as to its execution, authentication, and construction, but also as to the legal obligations arising from it, and as to what is to be deemed a performance, satisfaction, or discharge."

In *Union Central Life Insurance Co.* v. *Barnes, supra,* the Kentucky Court of Appeals noted that in *Clarey* it had been:

> ". . . Constrained to abide by the rules of comity always recognized and enforced here as elsewhere, rather than to impress its peculiar views upon a foreign contract subjected to litigation here. While it is against the public policy of this state to contract for a period of limitation less than that provided by our statute, where the contract is made and to be performed within the state, the public policy of the state is not affected or infringed by the making of such a contract elsewhere, and, under the rules of comity, we are bound to enforce a contract valid where made. Any other position would be at variance with all authority and entirely indefeasible [sic]."

The Court then noted that under this view it was immaterial that the wife-beneficiary was a resident of Kentucky when the cause of action accrued and when the suit was filed.

The basic point in *Clarey* as expressed in *Union Central Life Insurance Co.* v. *Barnes, supra,* was that life insurance contracts which contain provisions con-

trary to the public policy of Kentucky will yet be enforced by the courts of Kentucky when the contracts of insurance are made, and are to be performed, without the Commonwealth.

Such a rule is the sensible one to follow, and under Ohio conflict of laws rules governing insurance contracts, it is also the rule that the law of the place where the insurance contract was made governs the interpretation of the contract. *Switzer* v. *Carroll,* 358 F. 2d 424 (6th Cir. 1966).

In its opinion, the United States Court of Appeals for the Sixth Circuit admits that Phyllis had a chose in action, by reason of being designated originally as beneficiary, but opined that whether the extinction of this right constituted a deprivation of due process depended upon the nexus between the forum and the interest asserted. This, the Court of Appeals said, made *Home Insurance Company, supra,* and *Hartford Accident and Indemnity Company, supra* "inapposite". The Court therefore takes the inconsistent view that if Kentucky had jurisdiction over *Phyllis,* Kentucky Courts could then disregard the law of Ohio and impose Kentucky law upon these Ohio contracts.

The Court of Appeals opined that the situation was not a case of a state attempting to draw to itself control over contracts elsewhere validly consummated, because, in the Court of Appeals' view, Kentucky does not care about construction of the contract, but only about the division of marital property. This conclusion is an exercise in logic without head or tail. It amounts to saying that Kentucky can apply its law to

these contracts because it is only interested in dividing marital property; implicit in the argument is the assumption that deciding who gets the property does not amount to a construction of the contract. This theory never meets the argument that Kentucky may not divide the property because it has no jurisdiction over it.

The Court of Appeals apparently has the idea that the "construction" term of the contracts means that the operation of the terms of the policy (whatever that means) is to be according to Ohio law, but that this does not include the decision as to who is the proper beneficiary. This goes without citation of any statute, term of the contract or any other authority in support. In fact, the Court of Appeals admits that Kentucky would likely follow the choice of law provision in the contract. This is not much of an admission in view of *Clarey* and *Union Central Life Insurance Co.*, and especially where the Sixth Circuit Court of Appeals itself has recognized that:

> "[u]nder the law of Kentucky, a contract, which by its terms refers to a particular place of performance, is to be construed by the law of the place of performance." *Baumer* v. *Franklin County Distilling Co.*, 135 F. 2d 384 (6th Cir. 1943).

But the Court did concede that to be Kentucky law, and said that the relationship between Travelers and Mead, and Travelers and Jan would be governed by Ohio law. The court conveniently neglected to mention Phyllis in this connection, for if they had, they

would have been obligated to admit that she was a third party beneficiary to this contract. Once they conceded her privity to the contract, they would have to have admitted her rights were governed by Ohio law.

The Court of Appeals said that there is no supremacy rule saying which state law shall prevail as between themselves, and thus Kentucky does not have to yield to Ohio law. But Kentucky does have to yield to Ohio law, because there is a supremacy clause; that supremacy clause is found in the contracts, making Ohio law apply. Taking into consideration Kentucky conflicts rules, Ohio law is supreme in this case.

The Court of Appeals attempts to say that ordinary conflicts rules should be applied, barring Phyllis's claim under the theory of involuntary divestiture. This again is without citation of authority. Kentucky's conflicts rule is that Ohio contract terms, as in *Clarey* and *Union Central Life Insurance Co.,* will be enforced, *even though they violate* Kentucky public policy. Then, however, the Court of Appeals says that the District Court was right because a Kentucky Court would apply the restoration statute to these contracts because to do otherwise would violate Kentucky's public policy of dividing up marital property. This process of reasoning was not applied by the Sixth Circuit Court of Appeals in *Equitable Life Assurance Society of the United States* v. *Aaron,* 108 F. 2d 777 (6th Cir. 1940) where it held that where premiums for insurance policies were paid in Michigan and the policies delivered in Michigan, those policies were Michigan contracts and governed by the laws of that state.

The Federal courts, under the well known principles of *Erie Railway Co.* v. *Tompkins,* 304 U. S. 64, 58 Sup. Ct. 817, 82 L. Ed. 1188 (1938), are bound to follow Kentucky law and conclude that if the contract specifies that it is to be governed by Ohio law, and where the contract is in fact an Ohio contract, the contract term prevails and defeats efforts by Charles Wagner and Barbara to evade it. It was error on the part of the Courts below to conclude otherwise.

Based upon the precedent and logic necessary for a consideration of this case, it becomes obvious that the courts below did not act in conformity with Kentucky law, but contrary to it; Phyllis and the Children, on the other hand, are not asking for a decision contrary to Kentucky law, but in conformity with it. The cited cases demonstrate that Kentucky itself does not demand that Kentucky principles of law be utilized to adjudicate contracts created elsewhere and designed to be governed by laws of another state. Likewise, logic demands that Ohio would not be required to disregard its own law. The rules of comity demand that Ohio law be applied to this case.

II.

Ohio Law dictates that Phyllis receive the Insurance proceeds.

Since Ohio law applies, the question now becomes what rights in these policies Phyllis has under Ohio law. The answer is that her rights are total; she is entitled to the complete proceeds of the policies.

The applicable Ohio law is so unequivocal and frequently stated that it appears in even general legal

texts. Thus, in 30 *Ohio Jurisprudence* 2d, Insurance, Section 329, at page 318, the rule is expressed as follows:

> "The fact that the wife, who is the beneficiary in the policy of insurance upon the life of her husband issued prior to the divorce of the parties, is not subject to the objection that the divorce terminated her insurable interest, since the policy, originally valid, does not cease to be so by the cessation of the beneficiary's interest in the life of the insured; in other words, a subsequent divorce does not divest a wife's interest so far as prior insurance is concerned, so as to preclude her from taking the proceeds of the policy, at least where the policy contains no terms indicating that her right thereto is conditioned upon her remaining the wife of the insured. The fact that the insured husband remarries after the divorce does not alter the situation or change this rule."

When Jan executed the designation of beneficiary forms he named Phyllis as beneficiary. He noted her relationship to himself to be "Wife," but under Ohio law this term was merely descriptive. As early as 1900, the Ohio Supreme Court held that the "Wife" appellation is merely descriptive and the named beneficiary will take the policy proceeds even where the insured and named beneficiary are subsequently divorced, and even where the insured actually remarries. *Overhuser* v. *Mutual Life Insurance Co.*, 63 Ohio St. 77 (Ohio 1900). The rule that the extra verbiage "Wife" or "Wife of the insured" is simply unessential description has been

followed as late as 1963, in *Cannon* v. *Hamilton,* 174 Ohio St. 268 (Ohio 1963).

The total effect is that Ohio, sensibly enough, does not construe contracts of insurance to be anything other than what they truly are: contracts, printed on paper, with clearly stated terms governing the parties' respective rights. Thus, in Ohio, the right of a wife to recover the proceeds of an insurance policy does not hinge upon the relationship of husband and wife, but rather is determined by the law of contracts. *Hergenrather* v. *Metropolitan Life Insurance Co.,* 79 Ohio App. 116, 68 N. E. 2d 833 (Ohio 1946). Clear support for this view is found in *Federal Life Insurance Co.* v. *Tietsort,* 131 F. 2d 448 (7th Cir. 1942) *cert. den.* 318 U. S. 768.

Equally as important, from the standpoint of whether this court should grant this petition for a writ of certiorari, is the decision of the Seventh Circuit in *Federal Life Insurance Co.* v. *Tietsort,* that decision is in conflict with the decision of another Court of Appeals on the same matter, to wit, the Sixth Circuit Court of Appeals, within the intendment of Rule 19(1) of the Rules of Supreme Court of the United States.

III.

The Sixth and Seventh Circuit Courts of Appeal have rendered decisions concerning the same legal question and have answered the question in contrary manners, furnishing reason for this Court to grant this petition for a writ of certiorari.

In the case of *Federal Life Insurance Co.* v. *Tietsort, supra,* the Court of Appeals for the Seventh Circuit dealt with a case involving insurance obtained during the first marriage of the insured. The first wife was designated as beneficiary. The Court considered the problem to simply be one of contract; the laws of the state in which the policy was executed and issued (Illinois) were deemed applicable. As the Court stated at 449:

> "The insured's divorce from Ruth for her fault did not affect her rights as beneficiary. Her rights were created by the policy of insurance; they were not created by marriage. [Citations omitted.] If the insured desired to change the beneficiary, he had to comply with the terms of the policy, and since no other selection of a beneficiary was made in the manner prescribed by the policy before the insured died, the beneficiary's selection was valid as a vested interest in the fund."

The Court then held that since it was admitted that the insured had never made an effort to change the name of the beneficiary the divorced, *but designated,* woman was entitled to the proceeds of the policies.

There is a basic conflict in the decisions of the Sixth and Seventh Circuits, because in the instant case the decision is that the laws of Ohio do not determine

the recipient of the proceeds, although the policies were created in that state; the Seventh Circuit held to the contrary. But beyond the misunderstanding by the Sixth Circuit of what law should apply, there is a fundamental difference between the two circuits as to *why* the designated, divorced woman is to receive the proceeds; that is to say, Illinois had a statute at the time of the divorce of Tietsort and her former husband that empowered the state court to restore property to the spouse from whom it came. Since 1874, Section 16, Chapter 40 of the Revised Statutes of Illinois has provided:

> "Whenever a divorce is granted, if it shall appear to the court that either party holds the title to property equitably belonging to the other, the court may compel conveyance thereof to be made to the party entitled to the same upon such terms as it shall deem equitable."

That this is a "restoration" statute, having in mind the same effect as that contemplated by KRS 403.060 and 403.065, is made clear by various cases, *e.g., Walsh* v. *Walsh,* 372 Ill. 254, 23 N. E. 2d 341 (1939), *Gilbert* v. *Gilbert,* 305 Ill. 216, 137 N. E. 99 (1922) and *Coonce* v. *Coonce,* 296 Ill. 585, 130 N. E. 349 (1921). So it cannot be argued that Illinois law was so different from Kentucky law as to require a different decision.

Confronted with *Tietsort,* the Sixth Circuit Court of Appeals simply ignored it, thereby avoiding the problem of resolving the conflict between that case and this. Without doubt, the decision of the Seventh Circuit Court of Appeals is in conflict with the deci-

sion rendered in this case. First, the Sixth Circuit Court of Appeals has held in this case that Jan's divorce from Phyllis terminated her rights as beneficiary; the Seventh Circuit Court of Appeals would say that Phyllis's divorce did not affect her rights as beneficiary. Second, the Sixth Circuit says that Phyllis's rights under the policy were created by marriage; the Seventh Circuit would hold that her rights were created by the policy of insurance. Third, the Sixth Circuit has decided that there was an involuntary devestiture by operation of law; the Seventh Circuit would hold that the insured must comply with the terms of the policy relative to change of beneficiary before that change may be effective. Finally, the Sixth Circuit Court of Appeals says that Phyllis had only a chose in action, an expectancy; the Seventh Circuit Court of Appeals would say that she had a vested interest in the proceeds of these policies of insurance.

Ohio law follows the same logical concept of contract law, and *Cannon* v. *Hamilton, supra,* once again demonstrates that Phyllis must prevail. In *Cannon,* as in *Federal Life Ins. Co.* v. *Tietsort,* it was held that a change of beneficiary in a life insurance policy is ordinarily accomplished by following the procedure directed in the policy. Ohio law is obviously that the beneficiary does acquire rights in the policy, even though the insured usually retains the power to alter or terminate those rights; but if those rights are to be affected, say the courts of Ohio, that effect must be brought about in the manner provided by the contract. Whether the interest is called a "right", "expectancy"

or "chose in action" is immaterial, as the substance of Ohio law is that Jan was required to act under Ohio law, pursuant to the terms of an *Ohio* contract. He did not.

The Sixth Circuit Court of Appeals presumes Jan to have known Kentucky law, and this presumption is agreeable to Phyllis, for if he must have known Kentucky law he must also have known Ohio law. Since he knew Ohio law, he just as "presumably desired the result mandated" by Ohio law.

CONCLUSION

We respectfully urge this Court to issue a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit because of the compelling constitutional reasons in this case, and the irreconcilable conflict of the decision of the Sixth Circuit in this case and of the Seventh Circuit Court of Appeals in *Tietsort.*

We urge this decision because the Courts below erred by depriving the named beneficiary of the policy proceeds. This petition is heavy with merit, because the Courts below erred in holding that the Full faith and credit clause required these Ohio contracts to be governed by Kentucky law. Kentucky law, as expressed in *Baumer,* requires that Ohio contracts be governed by Ohio law and these contracts plainly are Ohio contracts.

In Ohio it makes no difference that the named beneficiary no longer has a marital relationship with the insured, so long as that insured has not exercised

his power to change the beneficiary. It is conclusively presumed that he intended no change. A similar rule was recognized by the Seventh Circuit Court of Appeals, but in this case the Sixth Circuit Court of Appeals has disregarded Kentucky law, although Kentucky law requires a similar effect. These conflicting decisions of the Sixth and Seventh Circuit Courts of Appeal require resolution and we respectfully urge this Court to grant this petitioner's request for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit, to review the case and to issue a mandate in favor of Phyllis Fields.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT

E. D. KENTUCKY, COVINGTON DIVISION

No. 1483

THE TRAVELERS INSURANCE COMPANY, - - *Plaintiff,*

v.

BARBARA G. FIELDS, Individually and as Administratrix of the Estate of Jan A. Fields, deceased, Phyllis N. Fields, Individually and as Guardian of Janet Marie Fields, Lori Alison Fields and Jan Scott Fields, Minors, Janet Marie Fields, Lori Alison Fields, Jan Scott Fields and Charles Paul Wagner, Administrator of the Estate of Jan A. Fields, deceased, - - - - - - - - - *Defendants.*

Dec. 16, 1970
As Corrected April 1, 1971

Interpleader action by insurer under life policy against widow of insured and insured's former wife and guardian of his minor children. On cross motions for summary judgment, the District Court, Swinford, J., held that where insured in 1965 designated wife as beneficiary of insurance policy negotiated and executed in Ohio, and in 1966 wife was granted absolute divorce from insured by decree of Kentucky Court, and in 1967 insured remarried but on date of his death in 1969 designation of beneficiary remained in name of former wife, Ohio courts would be required by full faith and credit clause to recognize validity of Kentucky

divorce decree as to its resolution of property rights and former wife had no rights under policy even though under Ohio law divorce does not affect former wife's rights as beneficiary.

Order accordingly.

1. Insurance—Key 585(3.1)

Under Ohio law, divorce does not affect a former wife's rights as beneficiary under husband's life policy.

2. Insurance—Key 585(3.1)

Under Kentucky law, an absolute divorce abrogates divorced wife's rights as beneficiary of life policy on her husband's life, despite her husband's failure to change the beneficiary after the divorce.

3. Divorce—Key 399(1)

Where insured in 1965 designated wife as beneficiary of insurance policy negotiated and executed in Ohio, and in 1966 wife was granted absolute divorce from insured by decree of Kentucky Court, and in 1967 insured remarried but on date of his death in 1969 designation of beneficiary remained in name of former wife, Ohio courts would be required by full faith and credit clause to recognize validity of Kentucky divorce decree as to its resolution of property rights and former wife had no rights under policy even though under Ohio law divorce does not affect former wife's rights as beneficiary. U.S.C.A. Const. art. 4, § 1 et seq.

William B. O'Neal, Covington, Ky., for plaintiff.

O'Hara, Ruberg & Cetrulo, Covington, Ky., for Phyllis N. Fields, Janet Marie Fields, Lori Alison Fields and Jan Scott Fields.

Stanley Chrisman, Covington, Ky., John A. Lloyd, Jr. and John A. West, Cincinnati, Ohio, for Barbara G. Fields and Charles Paul Wagner.

MEMORANDUM

SWINFORD, District Judge.

This is an interpleader action brought by the plaintiff, The Travelers Insurance Company, pursuant to Section 1335 of Title 28, United States Code. On September 17, 1965, the plaintiff issued to The Mead Corporation, the employer of the decedent, Jan A. Fields, a group insurance policy whereby the plaintiff agreed to pay the beneficiaries of certain employees of The Mead Corporation certain specified amounts of money upon proof of death of such employees. On September 9, 1969, the decedent, Jan A. Fields, died intestate as the result of an airplane accident near Shelbyville, Indiana. It is the plaintiff's contention that Jan A. Fields' former wife and guardian of his minor children, Phyllis N. Fields, and his widow and administratrix of his estate, Barbara G. Fields, may both make claims to the insurance policy proceeds. The plaintiff, in order to avoid conflicting claims, has deposited in the registry of this court a sum of $103,000, that being the amount of the proceeds due under the policy, and asks that the defendants, Phyllis N. Fields and Barbara G. Fields, be required to interplead in this action and litigate or settle between themselves their claims to the policy proceeds.

Both defendants have moved for summary judgment pursuant to Rule 56 of The Federal Rules of Civil Procedure. The pleadings, exhibits and affidavits show that there is no genuine issue as to any material fact. The controversy is, therefore, properly submitted to the court for judgment.

On September 17, 1965, Jan A. Fields did duly designate and nominate Phyllis N. Fields, as his wife, to be beneficiary

of the insurance policy. Approximately one year later on September 27, 1966, Phyllis N. Fields was granted an absolute divorce from Jan A. Fields by decree of the Kenton County Circuit Court of Kentucky. Jan A. Fields was remarried to Barbara G. Fields on June 6, 1967, however, on the date of his death, September 9, 1969, the designation of beneficiary remained in the name of Phyllis N. Fields.

The insurance policy was negotiated and executed in Ohio, and by its terms the place of performance was to be Ohio. Phyllis N. Fields asserts that the controversy must be characterized as a contractual matter and that this court in applying the law of the state in which it sits would be compelled to look to the laws of Ohio to determine in what manner the claims to the proceeds are to be adjudicated. The case of Baumer v. Franklin County Distilling Co., 135 F. 2d 384 (6 Cir. 1943), is cited for the proposition that, "under the law of Kentucky, a contract, which by its terms refers to a particular place of performance, is to be construed by the law of the place of performance". It is argued that this court, in applying the law of Ohio, would be obligated to resolve the litigation in favor of Phyllis N. Fields, notwithstanding her divorce and the subsequent remarriage of her husband. The Supreme Court of Ohio, in ruling upon the rights of a divorced wife designated as beneficiary has stated that when a married woman is named as a beneficiary in a policy of insurance on the life of her husband, she is entitled to the proceeds of the policy, despite a divorce obtained by her before his death. Overhiser's Adm'x v. Overhiser, 63 Ohio St. 77, 57 N. E. 965 (1900).

In a more recent case the Ohio Supreme Court held:

> "1. A married woman who is named as a beneficiary in a policy of life insurance is entitled to the proceeds upon the death of her insured husband, notwithstanding a divorce obtained by her from the insured before

his death. The designation of the beneficiary in the policy as the wife of the insured is merely descriptive.

"2. Ordinarily, a change of beneficiary in a policy of life insurance by the insured is accomplished by following the procedure directed in the policy." Cannon v. Hamilton, 174 Ohio St. 268, 189 N. E. 2d 152 (1963).

[1] It is clear that in Ohio divorce does not affect a former wife's rights as a beneficiary, as her rights are created by the policy and not by the marriage. The fact that the husband remarries after the divorce does not alter the situation as the designation of the beneficiary as "wife of the insured" has been construed to be merely descriptive and not dispositive of a controverted claim.

The Ohio cases, unlike the present suit, involved divorces which apparently did not require a restoration by each party to the other of such property obtained from the other during or by reason of the marriage.

Barbara G. Fields contends that any and all of the rights which Phyllis N. Fields may have had to the proceeds of the policy were extinguished upon the dissolution of her marriage to the insured by reason of Kentucky Revised Statutes 403.065 and 403.060. Kentucky Revised Statute 403.065 provides in pertinent part that:

"Every judgment for a divorce from the bond of matrimony shall contain an order restoring any property not disposed of at the commencement of the action, which either party may have obtained, directly or indirectly, from or through the other, during marriage, in consideration or by reason thereof; and any property so obtained without valuable consideration, shall be deemed to have been obtained by reason of marriage."

Kentucky Revised Statute 403.060 states in part that:

"(2) Upon final judgment of divorce from the bonds of matrimony, each party shall be restored all the

property, not disposed of at the beginning of the action, that he or she obtained from or through the other before or during the marriage and in consideration of the marriage."

[2] The Kentucky Court of Appeals, in applying the above statutes to situations analogous to the present case, has adopted and consistently held the position that an absolute divorce granted by a Kentucky Court abrogates a divorced wife's rights as a beneficiary of a life insurance policy on her husband's life, despite her husband's failure to change the beneficiary after the divorce. Sea v. Conrad, 155 Ky. 51, 159 S. W. 622 (1913); Schauberger v. Morel's Adm'r., 168 Ky. 368, 182 S. W. 198 (1916); Warren v. Spurlock's Adm'r., 292 Ky. 668, 167 S. W. 2d 858 (1943); and Salisbury v. Vick, Ky., 368 S. W. 2d 317 (1963). A divorced wife's rights as a beneficiary were recently considered by the Kentucky Court of Appeals in Bissell v. Gentry, Ky., 403 S. W. 2d 15 (1966). The opinion of Commissioner Ropke included the following language:

"This court has held consistently that the interest of a spouse as beneficiary comes squarely within the restoration provision of KRS 403.060, and as a result, every right of a divorced party as beneficiary of a policy of life insurance on the life of the other is extinguished, except in cases where the policy on the life of one of the parties is obtained during the marriage and the other pays the premiums during the marriage. In such case he or she is entitled to continue payments and receive the proceeds of the policy upon maturity.

* * * * * * * *

"There is a statement that neither Bissell nor his ex-wife paid any of the premiums on the policy in issue. It was a group policy furnished by Bissell's employer as part of the terms of his employment. The employ-

ment of Bissell was the only consideration for issuing this policy and paying the premiums necessary to keep it in force. The result is that it is as though Bissell individually procured and paid for the policy."

[3] If this case is to be decided as it is thought the courts of Ohio would decide it, then it must be assumed that the Ohio courts would be required by the Full Faith and Credit clause of Article IV of the Constitution to recognize the validity of the Kenton Circuit Court divorce decree, both as to its dissolution of the marriage, and as to its resolution of property rights. While a wife's rights as a beneficiary, according to Ohio law, are not affected by an alteration of her marital status, a judgment of a court of competent jurisdiction which substantially changes a wife's property rights and specifically terminates her rights as a beneficiary, would seem to be controlling. The Ohio courts, in recognizing the divorce, must also give full faith and credit to the restoration of property order as it has been construed by the Kentucky Court of Appeals. The legal effect of a divorce judgment must be determined in accordance with the laws of the state granting the divorce, Desjardins v. Desjardins, 193 F. Supp. 210 (E. D. Ky. 1961), therefore an Ohio court would be compelled to give Phyllis N. Fields' divorce the same legal effect as would a Kentucky court. Although an Ohio court may deem Phyllis N. Fields' divorce, as it affects marital status, not to have affected her interest in the policy, clearly an Ohio court would be impelled to recognize the restoration of property order, which by construction of the laws of the state wherein the divorce was granted, explicitly extinguished her rights as a beneficiary.

It is this court's opinion that judgment must be entered in favor of defendant, Barbara G. Fields and that she, as administratrix of the estate of Jan A. Fields, is entitled to

the proceeds of the policy. Phyllis N. Fields' rights under the policy were abrogated on September 27, 1966, the date of the divorce, and there having been no affirmative act by the insured to restore those rights, she has no legal right to the policy proceeds. Even if this case is to be strictly characterized as a matter of Ohio contract law as defendant, Phyllis Fields, contends, Ohio contract law cannot restore to her those rights which she as a part of her divorce surrendered.

An order in conformity with this memorandum is this day entered.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 71-1164

THE TRAVELERS INSURANCE COMPANY, - *Plaintiff-Appellee,*

v.

BARBARA G. FIELDS, Individually and as Administratrix of the Estate of Jan A. Fields, Deceased, - - *Defendant-Appellee,*

AND

PHYLLIS N. FIELDS, Individually and as Guardian, and JANET MARIE FIELDS, LORI ALLISON FIELDS, and JAN SCOTT FIELDS, - - - - - *Defendants-Appellants,*

AND

CHARLES P. WAGNER, Administrator of the Estate of Jan A. Fields, - *Defendant-Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY

Decided and Filed December 13, 1971

Before: WEICK, McCREE and KENT, Circuit Judges.

McCREE, Circuit Judge. This is an interpleader action brought pursuant to 28 U.S.C. § 1335 by the Travelers Insurance Company (Travelers) in the United States District Court for the Eastern District of Kentucky. Named as defendants were Barbara G. Fields, widow of the insured and administratrix of his Ohio estate, and Phyllis N. Fields,

his first wife and guardian of their children. This appeal has been taken by Phyllis Fields from a judgment in favor of Barbara. We affirm.

Jan A. Fields, a citizen of Kentucky, was employed by the Mead Corporation at a plant in Ohio. In May 1960 and December 1964, Travelers issued group insurance policies to Mead, insuring Mead's employees against accidental death. Both policies contained the following provision:

> This policy is issued and delivered in the State of Ohio and shall be governed by the laws of that state.

Jan became insured under these policies in the amount of $103,000. He designated Phyllis, his wife at that time, beneficiary on both policies.

Subsequently, Phyllis instituted an action for divorce in the Kenton County Circuit Court in Kentucky. Both Phyllis and Jan were citizens of Kentucky and both appeared personally in the action. On September 27, 1966, a divorce decree was entered. As required by K.R.S. § 403.065 (1962), the decree contained a restoration-of-property provision, adjudging that

> each party shall restore to the other such property not disposed of at the commencement of this action as either may have obtained directly or indirectly from or through the other during said marriage in consideration or by reason thereof.[1]

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[1] K.R.S. § 403.060(2) provides:

(2) Upon final judgment of divorce from the bonds of matrimony, each party shall be restored all the property, not disposed of at the beginning of the action, that he or she obtained from or through the other before or during the marriage and in consideration of the marriage.

This vesting statute is implemented by inclusion of its terms in all divorce decrees rendered in the state, as required by K.R.S. § 403.065:

(Footnote continued on following page)

The property settlement agreement negotiated by the parties was silent concerning the proceeds of the Travelers policies.

Thereafter, on June 6, 1967, Jan married Barbara Fields. On September 9, 1969, without having changed the designation of Phyllis as beneficiary, Jan died in an airplane crash. Both Phyllis and Barbara, the latter in her capacity as administratrix of Jan's Ohio estate (he was a citizen of Ohio at his death), claimed the proceeds of the policies.

The court below granted summary judgment in favor of Barbara. Judge Swinford held that, since the Kentucky courts have consistently construed the state's restoration-of-property statute to abrogate the interest of a divorced spouse named as beneficiary even if the designation is not altered on the policy, Phyllis' rights under the Travelers policies were extinguished by the 1966 divorce decree. This decree, Judge Swinford wrote, would be given full faith and credit by Ohio courts "both as to its dissolution of the marriage, and as to its resolution of property rights." Thus,

> an Ohio court would be impelled to recognize the restoration of property order, which by construction of the laws of the state wherein the divorce was granted, explicitly extinguished [Phyllis'] rights as a beneficiary.

Every judgment for a divorce from the bond of matrimony shall contain an order restoring any property not disposed of at the commencement of the action, which either party may have obtained, directly or indirectly, from or through the other, during marriage, in consideration or by reason thereof; and any property so obtained, without valuable consideration, shall be deemed to have been obtained by reason of marriage. The proceedings to enforce this order may be by petition of either party, specifying the property which the other has failed to restore; and the court may hear and determine the same in a summary manner, after ten days' notice to the party so failing.

He added that, even if the case were to be characterized as a "matter of Ohio contract law," which was Phyllis' contention, "Ohio contract law cannot restore to [Phyllis] those rights which she as a part of her divorce surrendered."

On appeal, Phyllis contends that the court erred in its determination that her status as beneficiary was extinguished by the Kentucky divorce decree. She argues that this result violates her rights under the due process clause of the Fourteenth Amendment and offends the dictates of the full faith and credit clause. We consider these contentions in this order.

The Kentucky courts have consistently held since 1913 that the restoration-of-property order in a Kentucky divorce decree extinguishes the divorced wife's rights[2] as a beneficiary of a life insurance policy on her husband's life despite the failure of the husband to change her designation as such following the divorce.[3] *Bissell* v. *Gentry*, 403 S. W. 2d 15 (Ky. 1966); *Salisbury* v. *Vick*, 368 S. W. 2d 317 (Ky. 1963); *Warren* v. *Spurlock's Administrator*, 292 Ky. 668, 167 S. W. 2d 858 (1943); *Schauberger* v. *Morel's Administrator*, 168 Ky. 368, 182 S. W. 198 (1916); *Sea* v. *Conrad*, 155 Ky. 51, 159 S. W. 622 (1913). The *Bissell* case, *supra*, applied this rule to the divorced wife's rights in a group insurance policy issued, as here, to her husband's employer.

Appellant does not dispute this statement of Kentucky law. Her contention is that Kentucky law does not apply

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[2] When the insured reserves the right to change the beneficiary on the policy, as here, under the law of Kentucky and of Ohio the beneficiary's "right" in the policy is not vested but is merely an "expectancy." *See McKenty* v. *Caldwell*, 287 Ky. 750, 155 S. W. 2d 193 (1941); *Stone* v. *Stephens*, 155 Ohio St. 595, 99 N. E. 2d 766 (1951).

[3] There are two exceptions to this rule, neither of which applies in this case. If the divorced wife paid the policy premiums from her separate funds after the divorce, she may recover the amount she paid from the policy proceeds. *Salisbury* v. *Vick*, 368 S. W. 2d 317 (Ky. 1963). If she paid all the premiums, she may recover all the proceeds. *Johnson* v. *Johnson's Administratrix*, 297 S. W. 2d 753 (Ky. 1956).

in this case because of both the provision in the insurance contract between Travelers and Mead that the contract shall be governed by the law of Ohio and the significant Ohio contacts involved in the issuance and maintenance of the contract. In Ohio, a divorce does not extinguish the rights of the wife named as beneficiary. There, the named beneficiary still recovers the proceeds because the designation "wife" is regarded as merely descriptive. *See, e.g., Cannon v. Hamilton,* 174 Ohio St. 268, 189 N. E. 2d 152 (1963).

In support of her contention that Kentucky law does not govern the case at bar, appellant relies principally upon the recent decision of Judge Moynahan of the Eastern District of Kentucky in *Morgan* v. *United States,* 315 F. Supp. 213 (E.D. Ky. 1969). In that case, the dispute concerned the proceeds of a National Service Life Insurance policy. These policies are issued to veterans of United States military service pursuant to 38 U.S.C. § 701 et. seq. Since the Supreme Court has previously construed this Act as requiring that the insurance proceeds go to the named beneficiary, in the context of a dispute between a serviceman's wife in a community property state and the named beneficiaries, *Wissner* v. *Wissner,* 338 U. S. 655 (1950), the issue presented in *Morgan* was whether that federal rule took precedence over the Kentucky restoration-of-property doctrine. Judge Moynahan held that the matter was "one involving the primacy of federal law," and awarded the proceeds to the divorced wife named as beneficiary. 315 F. Supp. 215.

Appellant apparently argues that the *Morgan* decision is based upon principles of comity rather than the supremacy of federal law, and that those same principles would mandate Kentucky's deference in the instant context to Ohio law. We disagree.

In *Wissner, supra,* the widow of a serviceman claimed one-half the proceeds of a National Service Life Insurance policy, although she had not been named beneficiary, on the ground that the state of her domicile was a community prop-

erty state, under whose law she was entitled to one-half ownership of the policy. The Court reversed the state court's determination that state law took precedence, and held that the congressional purpose in enacting this insurance program would be frustrated if the policy proceeds were not paid to the named beneficiaries. The Court stated:

> The National Service Life Insurance Act is the congressional mode of affording a uniform and comprehensive system of life insurance for members and veterans of the armed forces of the United States. A liberal policy toward the serviceman and his named beneficiary is everywhere evident in the comprehensive statutory plan. Premiums are very low and are waived during the insured's disability; costs of administration are borne by the United States; liabilities may be discharged out of congressional appropriations.
>
> The controlling section of the Act provides that the insured "shall have the right to designate the beneficiary or beneficiaries of the insurance [within a designated class], . . . and shall . . . at all times have the right to change the beneficiary or beneficiaries. . . ." 38 U.S.C. § [717(a)]. *Thus Congress has spoken with force and clarity in directing that the proceeds belong to the named beneficiary and no other. Pursuant to the congressional command, the Government contracted to pay the insurance to the insured's choice.* He chose his mother. It is plain to us that the judgment of the lower court, as to one-half of the proceeds, substitutes the widow for the mother, who was the beneficiary Congress directed shall receive the insurance money. We do not share appellee's discovery of congressional purpose that widows in community property states participate in the payments under the policy, contrary to the express direction of the insured. Whether directed at the very money received from the

> Government or an equivalent amount, the judgment below nullifies the soldier's choice and *frustrates the deliberate purpose of Congress.* It cannot stand.

338 U. S. at 658-59 (emphasis added). In *Legatic* v. *United States*, 40 F.R.D. 114, 117 (E.D. N.Y. 1966), relied upon by Judge Moynahan in *Morgan*, the court held that National Service Life Insurance policies are "contracts with the United States," their terms "governed by federal statutes and regulations in determining who is to share in the benefits arising therefrom."

These cases merely involve particular applications of the familiar principle that, where the purpose of a federal law requires subordination of state policy, the supremacy clause proscribes application of the state law embodying that policy. *See, e.g., Free* v. *Bland*, 369 U. S. 663 (1962); *Franklin National Bank* v. *New York*, 347 U. S. 373 (1954). *Cf. Clearfield Trust Company* v. *United States*, 318 U. S. 363 (1943). There is, of course, no supremacy clause to mandate the primacy of the policy of one state over that of another state, and it follows that Kentucky is not required to deny application of its law affecting property involved in a divorce in favor of that of Ohio. This is so regardless of the provision in the contracts that they "shall be governed by the laws of [Ohio]." Although that provision might require Kentucky courts to apply Ohio law in the resolution of any dispute about the operation of the insurance contract terms[4]

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[4] This choice-of-law provision in the contracts most likely would be given effect by a Kentucky court. *See* Restatement (Second) of Conflict of Laws § 192, comment *b* (1971). Moreover, the policies were accepted and administered in Ohio, and the policy premiums were paid in Ohio by the employer. In these circumstances, the relationship between Travelers and Mead, as well as that between Travelers and Jan Fields, is governed by Ohio law. *See Boseman* v. *Connecticut General Life Insurance Co.*, 301 U. S. 196 (1937); *Equitable Life Assurance Society of the United States* v. *Aaron*, 108 F. 2d 777 (6th Cir. 1940); *Continental Assurance Co.* v. *Henson*, 297 Ky. 764, 181 S. W. 2d 431 (1944).

even if that application violated Kentucky public policy or contradicted Kentucky law, *see, e.g., Union Central Life Insurance Company* v. *Barnes*, 175 Ky. 364, 194 S. W. 339 (1917); *Clarey* v. *Union Central Life Insurance Company*, 143 Ky. 540, 136 S. W. 1014 (1911); *but see Griffin* v. *McCoach*, 313 U. S. 498 (1941); *Dial* v. *Fisk*, 197 S. W. 2d 598 (Tex. Civ. App. 1946), nevertheless, ordinary principles of conflicts of law should apply to determine what effect the restoration-of-property provision had on the designation of beneficiary. We believe the Kentucky courts would apply Kentucky law and hold that it extinguished appellant's expectancy, and we hold that the district court correctly followed that law and found that there was an involuntary divestiture.

Support for this view is found in the opinion of Judge Learned Hand in *New England Mutual Life Insurance Co.* v. *Spence*, 104 F. 2d 665 (2d Cir. 1939). In that case, the insured, a citizen of New York, named his wife beneficiary of a life insurance policy that was issued and payable in Massachusetts. The couple then moved to Texas, where, upon petition of the insured, they were later divorced. The divorce decree did not mention the policy proceeds. Under New York and Massachusetts law, the decree would not have extinguished the rights of the named beneficiary. In Texas, however, a divorce passed the wife's interest in the policy to her husband since she was deemed no longer to have an insurable interest in his life. The question thus presented was whether New York courts would apply New York (or Massachusetts) law or Texas law in determining the rights of the divorced wife. Or, as Judge Hand phrased the issue, "whether the law of conflict of laws of New York will treat as valid an involuntary transfer of the wife's chose in action, valid by the law of the place where both parties resided." 104 F. 2d at 666.

The court held that Texas law controlled, stating:

> There can be no doubt that if the transfer had been voluntary, i. e. by assignment, the courts of New York would follow the law of the place where the assignment took place. Olmsted v. Keyes, 85 N.Y. 593. In this respect insurance policies are no different from other choses in action. Miller v. Campbell, 140 N.Y. 457, 35 N.E. 651; Jackson v. Tallmadge, 216 App. Div. 100, 214 N.Y.S. 528. This is indeed the law generally. Farmers' L. & T. Co. v. Minnesota, 280 U. S. 204, 214, 50 S. Ct. 98, 74 L. Ed. 371, 65 A.L.R. 1000; Restatement of Conflict of Laws, § 350. We can see no reason to distinguish an involuntary transfer, when both parties are present within the state, where the transaction occurs; a fortiori, when they are both domiciled there. There is no magic in consent; the law of the place where an assignment takes place, assigns to it such consequences as it chooses: sometimes it will effectuate the parties' intent; sometimes it will frustrate it. Other states need not of course recognize the effect it gives, and they will not, if it is too offensive to their taste. But otherwise they do; among other reasons, because it avoids a shifting of rights with the forum. Similarly any state in which a non-consensual transaction occurs—a conviction of felony for example—may attach to it such consequences to the participants as it sees fit. And when the law of the state of the transaction makes it transfer property, we cannot see why other states should balk at recognizing the validity of that transfer as much as though the transaction had been an assignment. The involuntary transfer of chattels at any rate is so recognized. Green v. Van Buskirk, 7 Wall. 139, 19 L. Ed. 109; Hervey v. Rhode Island Locomotive Works, 93 U. S. 664, 23 L. Ed. 1003; Clark v. Williard, 292 U. S.

> 112, 54 S. Ct. 615, 78 L. Ed. 1160 (semble). The putative transferor must indeed be within the state, but that is implied in saying that he is a participant in the transaction. Nor can we see that the law of the place of performance has anything more to do with the question than when the transfer is by assignment. In both situations the law of the place of performance will indeed determine what is performance; that is, whether the obligor need perform to anyone but the original obligee. But when the obligor is indifferent to the identity of the obligee, so he be discharged, no question of performance arises, and the only relevant issue is as to the validity of the transfer as between the transferor and the transferee.

104 F. 2d at 666-67.

If anything, the instant facts constitute a more appropriate situation than does *Spence* for application of the fiction of involuntary assignment, as shown by the dissent of Judge Clark in that case. He conceded that phrasing the issue in terms of involuntary transfer mandated the majority's result. It was his contention, however, that no transfer had occurred. The divorce decree did not refer to the policy proceeds, and under Texas law the decree did not in and of itself operate to effect a transfer. The Texas rule of insurable interest, according to Judge Clark, pertained only to proof that under Texas insurance law, the named beneficiary qualified as a beneficiary on a Texas insurance contract. Since the contract in *Spence* was not a Texas contract, whether the beneficiary properly qualified as such depended on the law of the place of contracting. Thus, Judge Clark felt that Texas courts would not apply Texas insurance law to a New York or Massachusetts policy in the absence, at least, of a Texas statute or a provision in the divorce decree, requiring that the divorced wife surrender the rights she may have under the insurance laws of

another state. 104 F. 2d at 668-69.[5] Here, no question exists, in the light of Kentucky cases construing K.R.S. § 403.060(2), whether a transfer occurred, which was the element Judge Clark found to be missing in *Spence*. Since the general rule is that an assignment of rights under a life insurance policy is governed by the law of the place where the assignment was made, *see* Anno., 97 A.L.R. 2d 1399, 1401 (1964),[6] a transfer in Kentucky from appellant to Jan Fields is governed by Kentucky law.

Appellant also argues that a holding that the Kentucky statute operated to extinguish her expectancy as named beneficiary violates her constitutional right to due process of law. She places her principle reliance on *Home Insurance Company* v. *Dick*, 281 U. S. 397 (1930), and *Hartford Accident & Indemnity Company* v. *Delta & Pine Land Company*, 292 U. S. 143 (1934).

In *Dick*, a Texas citizen sued a Mexican insurance company in Texas to recover on a fire insurance policy insuring

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[5] Texas courts subsequently did apply this Texas doctrine to insurance contracts made in and governed by the laws of other states, on the ground that it was against the public policy of the state for its courts to award policy proceeds to a beneficiary without an insurable interest. *Dial* v. *Fisk*, 197 S. W. 2d 598 (Tex. Civ. App. 1946); *Cole* v. *Browning*, 187 S. W. 2d 588 (Tex. Civ. App. 1945).

[6] On the question of assignment of contract rights, the recently revised Restatement (Second) of Conflict of Laws § 209 (1971) states the rule more broadly:

> The validity of an assignment of a contractual right not embodied in a document, which is assignable under the rule of § 208, and the rights created thereby as between the assignor and the assignee are determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the assignment and the parties.

This provision does not, however, undercut the rule stated in the text concerning the assignment of rights under an insurance policy, as is illustrated by comment e of § 209:

> When the acts of assignment on the part of both assignor and assignee are done in the same state, this state will usually be the state of most significant relationship, except when the place of assignment bears no normal relation to the transaction.

a boat in Mexican waters. Jurisdiction was acquired in Texas by garnishment of insurance companies doing business in Texas that had reinsured, by contract with the Mexican company, part of the risk it had assumed. The garnishees denied the existence of a res within Texas, asserting that the plaintiff had not complied with a provision in the insurance policy requiring suit to be brought within one year from the date of loss. This provision was held inapplicable by the Texas courts because of a Texas statute invalidating such limitations. The Supreme Court reversed, holding that the application of the Texas statute to this Mexican insurance policy violated the due process clause of the Fourteenth Amendment.

Delta & Pine involved a suit in Mississippi on a policy issued in and governed by the laws of Tennessee. The Mississippi courts refused to give effect to a policy provision limiting the insurer's liability to suits brought within a specified time. This holding was based on a Mississippi statute invalidating such limitation clauses, which was held applicable to the contract under a Mississippi statute deeming insurance contracts on interests in the state to have been made in the state. The contract was an indemnity bond covering an employee of plaintiff at its Mississippi office. The Supreme Court reversed, as in *Dick*, on the ground that the Mississippi statutes, as construed, violated defendant's due process rights.

These cases are inapposite here because Kentucky's contacts are more than sufficient to permit application of her statutes. The Court stressed in *Dick* that nothing relating to the policy was done in Texas and that Texas laws and courts were invoked only for the bringing of suit. In these circumstances, Texas was

> without power to affect the terms of contracts so made. Its attempt to impose a greater obligation than that agreed upon and to seize property in payment of the

> imposed obligation violates the guaranty against deprivation of property without due process of law. . . . [Texas] may not abrogate the *rights of parties beyond its borders having no relation to anything done or to be done within them.*

281 U. S. at 408, 410 (emphasis added). Similarly, in *Delta & Pine* the Court held that a state "cannot extend the effect of its laws beyond its borders so as to destroy or impair the right of citizens of other states to make a contract not operative within its jurisdiction, and lawful where made." 292 U. S. at 149. Both cases turned on the alteration by the forum state of contractual obligations undertaken outside that state.

In the instant case, Travelers does not complain that the Kentucky restoration-of-property statute deprived it of property without due process of law, as did the insurance companies in *Dick* and in *Delta & Pine*, because neither its property rights nor its contractual rights and obligations were affected: its liability was clear, a liability that it recognized by instituting this interpleader action and paying the proceeds into court for proper disposition. Appellant, on the other hand, possessed a chose in action that was extinguished. Whether this extinction violated her due process rights depends, in turn, on the nexus between the forum and the interest asserted. *Dick, supra.* Whatever may have been the nature under Ohio law of appellant's interest in the Travelers policies, the state of Kentucky had the power, because of its jurisdiction over appellant, to assert jurisdiction over that interest. *See Texas* v. *New Jersey*, 379 U. S. 674 (1965); *Farmers Loan & Trust Company* v. *Minnesota*, 280 U. S. 204 (1930); *Blodgett* v. *Silberman*, 277 U. S. 1 (1928); Restatement (Second) of Conflict of Laws § 65 (1971). This is not a case of a state attempting, as in *Delta & Pine, supra*, "to draw to [itself] control

over the obligations of contracts elsewhere validly consummated and to convert them for all purposes into [its] interests as contrasted with those created at the place of the contract . . . ." 292 U. S. at 150. Kentucky has no interest in defining and construing the contractual obligations; it does, however, have a strong interest in ascertaining and dividing whatever property is possessed by its citizens who are properly before its courts in a divorce action. The Fourteenth Amendment does not require that the state, in adjudicating the division of this property, ignore its own laws and look to the law of each state in which rights to the property originated to determine the effect of the divorce upon those rights.

We find no merit in appellant's contention that this result offends the full faith and credit clause. U. S. Const. art. IV, § 1.

Finally, this result is by no means inevitable whenever a couple in these circumstances is divorced in Kentucky. Jan Fields could very easily have avoided the effect of the Kentucky restoration-of-property law, which he is presumed to know, by providing in the property settlement that appellant was to have the proceeds of the Travelers policies or by redesignating her after the decree. By neglecting to do so, he presumably desired the result mandated by the Kentucky statute.

The judgment of the District Court is affirmed.

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IN THE

Supreme Court of the United States

No. 71-1155

PHYLLIS N. FIELDS, Individually and as Guardian of Janet Marie Fields, Lori Alison Fields and Jan Scott Fields

Petitioners

—vs—

THE TRAVELERS INSURANCE COMPANY;

BARBARA G. FIELDS, Individually and as Administratrix of the Estate of Jan A. Fields, Deceased; and

CHARLES P. WAGNER, Administrator of the Estate of Jan A. Fields, Deceased

Respondents

BRIEF ON BEHALF OF RESPONDENT, BARBARA G. FIELDS, ADMINISTRATRIX OF THE ESTATE OF JAN A. FIELDS, DECEASED, IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

No. 71-1155

PHYLLIS N. FIELDS, Individually and as Guardian of Janet Marie Fields, Lori Alison Fields and Jan Scott Fields

Petitioners

—vs—

THE TRAVELERS INSURANCE COMPANY;
BARBARA G. FIELDS, Individually and as Administratrix of the Estate of Jan A. Fields, Deceased; and
CHARLES P. WAGNER, Administrator of the Estate of Jan A. Fields, Deceased

Respondents

BRIEF ON BEHALF OF RESPONDENT, BARBARA G. FIELDS, ADMINISTRATRIX OF THE ESTATE OF JAN A. FIELDS, DECEASED, IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

This case was commenced in the United States District Court for the Eastern District of Kentucky by Respondent, The Travelers Insurance Company (Travelers), as an interpleader action under 28 U.S.C. § 1335. Jurisdiction was founded on the diversity of citizenship of the parties. Involved are the accidental death proceeds of two employer group insurance policies under which Jan A. Fields was covered at the time of his death. Named as defendants were Phyllis N. Fields, Petitioner, Jan A. Fields' first wife

and the named beneficiary of the two group policies, and Barbara G. Fields, Respondent, Jan A. Fields' widow and the Administratrix of his Estate.*

The pertinent facts which bear on this Petition are as follows: In May 1960 and December 1964 Travelers issued two group insurance policies to The Mead Corporation (Mead) under the terms of which certain employees of Mead and its subsidiary companies became insured against bodily injury, dismemberment and accidental death. The two policies provided accidental death benefits in the total amount of $103,000.

Jan A. Fields, an employee of the Chatfield Paper Company, a subsidiary of Mead, became covered under the two group policies on September 17, 1965 and December 1, 1965, respectively. Petitioner, Phyllis N. Fields, then the wife of Jan A. Fields, was named as the beneficiary of both policies.

On September 27, 1966, by decree of the Kenton Circuit Court, Kenton County, Kentucky, Petitioner was granted an absolute divorce from Jan A. Fields. Both parties were citizens of Kentucky and both appeared personally in the divorce action. The divorce decree of the Kenton Circuit Court provided in pertinent part:

> It is further considered and adjudged by the court that each party shall restore to the other such property not disposed of at the commencement of this action as either may have obtained directly or indirectly from or through the other during said marriage in consideration or by reason thereof.

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* Subsequent to the filing of the Complaint in Interpleader Charles P. Wagner was appointed by the Kenton County Court as Administrator of the Estate of Jan A. Fields in Kentucky. By agreement of the parties, Travelers was given leave to file an Amended Complaint in Interpleader for the purpose of naming Mr. Wagner as a defendant.

On June 6, 1967 Jan A. Fields married Barbara G. Fields.

On September 9, 1969 Jan A. Fields died intestate in the crash of Allegheny Flight 853 near Shelbyville, Indiana. Respondent, Barbara G. Fields, the widow, was appointed Administratrix of Jan A. Fields' Estate by the Court of Common Pleas of Hamilton County, Ohio, Probate Division.

Both the Estate of Jan A. Fields, acting through Respondent, Barbara G. Fields, Administratrix, and Petitioner, Phyllis N. Fields, the divorced former wife, asserted claims to the entire accidental death proceeds of the group insurance policies.

On the foregoing facts the case was presented to the Federal District Court for the Eastern District of Kentucky on cross motions for summary judgment. On December 16, 1970 the court granted summary judgment in favor of Respondent, Barbara G. Fields, Administratrix, ruling that:

(1) Under Kentucky law the restoration of property order in the divorce decree of the Kenton Circuit Court extinguished Petitioner's interest as the named beneficiary of the accidental death proceeds of the two group insurance policies and that, therefore, the proceeds of the policies belong to the Estate of the insured; and

(2) The full faith and credit clause of the United States Constitution requires that the restoration of property order in the divorce decree be given the same force and effect by the district court or by an Ohio court as it would be given by a Kentucky court and that, in accordance with such effect, the Estate of Jan A. Fields is entitled to receive the proceeds of the policies.

Phyllis N. Fields appealed to the United States Court of Appeals for the Sixth Judicial Circuit and on December

13, 1971, the court of appeals affirmed the judgment of the district court in favor of Barbara G. Fields, Administratix. Speaking for a unanimous panel, Circuit Judge McCree held that the district court properly applied the restoration of property order in the Kenton Circuit Court divorce decree which extinguished Petitioner's expectancy in the accidental death proceeds of the group insurance policies.

Before considering the issues raised in the Petition, we feel constrained to make several observations concerning Petitioner's "Statement of the Case." First, throughout the Petition, the phrase "Phyllis and the Children" appears. Presumably the inference to be drawn is that the Fields children have an interest in the proceeds of the group insurance policies which is somehow dependent upon the interest claimed by their mother, Phyllis N. Fields. In fact, if Phyllis N. Fields had prevailed in this action, she would have been awarded the proceeds outright and the children would have received nothing. On the other hand, under the judgment of the district court, the proceeds will be paid to the Estate of Jan A. Fields, two-thirds of which will pass to his children under the Ohio statute of descent and distribution.

Secondly, contrary to the implication imparted by Petitioner (Petition, 4) the insurance policies in question are not life insurance policies; they are group accident policies containing incidental death benefits. Once the nature of the policies is recognized it becomes clear that, contrary to Petitioner's contention, it would have been most unusual if the separation agreement between Petitioner and Jan A. Fields had contained any reference to the policies.

Finally, Petitioner states that the effect of the rulings of the district court and the court of appeals is to deprive her as Jan A. Fields' "intended beneficiary" of the

accidental death proceeds. (Petition, 5) As hereafter set forth, Petitioner's Kentucky divorce decree extinguished her expectancy as beneficiary of the accidental death proceeds without the necessity of any action by Jan A. Fields. It is, therefore, manifestly incorrect to suggest, as Petitioner does, that Jan A. Fields' failure to effect a change of beneficiary after the divorce indicates his intention that his divorced wife remain the beneficiary of the accidental death proceeds. Indeed, as fully recognized by the court of appeals, in order for Petitioner to remain as beneficiary, affirmative action by Jan A. Fields would have been required. *The Travelers Ins. Co. v. Fields*, 451 F. 2d 1292, 1300 (6th Cir. 1971).

ARGUMENT

The Petition for a Writ of Certiorari should be denied for the reasons that:

I. THE DECISION OF THE COURT OF APPEALS AFFIRMING THE JUDGMENT OF THE DISTRICT COURT IN FAVOR OF RESPONDENT, BARBARA G. FIELDS, ADMINISTRATRIX, WAS MANIFESTLY CORRECT UNDER APPLICABLE LEGAL PRINCIPLES.

(a) The Restoration of Property Order in the Divorce Decree of the Kenton Circuit Court Extinguished Petitioner's Expectancy * In the Accidental Death Proceeds of the Group Insurance Policies.

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* Throughout the Petition reference is made to Petitioner's "rights" under the two group insurance policies. While it is not uncommon to refer to the interest of a beneficiary as a "right," under Kentucky law where the right to change the beneficiary is reserved (as it was under both group policies) the named beneficiary has no "rights" in the policy but rather has what is characterized as an "expectancy." *McKenty v. Caldwell*, 287 Ky. 750, 155 S.W.2d 193 (1941); *Calavas, Adm'r v. Gouvas*, 269 Ky. 752, 108 S.W.2d 820 (1937). The same is true under the law of Ohio. *Stone v. Stephens*, 155 Ohio St. 595, 99 N.E.2d 766 (1951); *Oetting, Gdn. v. Sparks*, 109 Ohio St. 94, 143 N.E. 184 (1923).

Kentucky has a statutory requirement that each party to a divorce action restore to the other party all property received during marriage and in consideration thereof. Section 403.060, Kentucky Revised Statutes, provides in part:

> Upon final judgment of divorce from the bonds of matrimony, each party shall be restored all the property, not disposed of at the beginning of the action, that he or she obtained from or through the other before or during the marriage and in consideration of the marriage.

Under § 403.065, K.R.S., every decree of divorce must contain a restoration of property order in accordance with § 403.060. As noted above, the divorce decree under which Petitioner was granted an absolute divorce from Jan A. Fields contained such an order.

In construing § 403.060, the Kentucky Court of Appeals, in an unbroken line of decisions beginning in 1913, has held that the restoration of property order in an absolute decree of divorce granted by a Kentucky court extinguishes the divorced wife's rights as a beneficiary of an insurance policy on her husband's life notwithstanding the failure of the husband to effect a change of beneficiary after the divorce.* This rule was first announced by the Kentucky Court of Appeals in *Sea v. Conrad*, 155 Ky. 51, 159 S.W. 622 (1913), wherein the decedent purchased a term life insurance policy on his life and named his wife

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* This rule is subject to two exceptions: If the divorced wife paid part of the policy premiums from her separate earnings or funds, she is entitled to recover the premiums paid plus interest from date of payment out of the policy proceeds. *Salisbury v. Vick*, 368 S.W.2d 317 (Ky. Ct. App. 1963). If the divorced wife paid all the premiums from her separate earnings or funds she may recover the entire policy proceeds. *Johnson v. Johnson's Adm'r*, 297 S.W.2d 753 (Ky. Ct. App. 1957). Neither of these exceptions has any bearing on the present case.

as the beneficiary. Subsequently, he and his wife were divorced by a Kentucky court. The divorce decree contained a restoration of property clause identical to the one in the Fields' divorce decree. No change of beneficiary was made by the decedent after the divorce. Upon the death of the insured, both the insured's ex-wife and the administrator of the insured's estate claimed the insurance proceeds. The court held that the proceeds were payable to the estate, stating:

> There can be no doubt of the fact that [the ex-wife] was, by the terms of the policy issued on the life of [the deceased], named therein as the beneficiary because she was his wife and by reason thereof had an insurable interest in his life. It is patent therefore, that whatever interest or right she then had or took under the policy was acquired in consideration or by reason of her marriage to [the deceased]. The interest or right she thus acquired was destroyed by the judgment of divorce which operated by virtue of its terms and the provisions of [Sec. 403.060, K.R.S.] to divest her of it. * * *
>
> While [the ex-wife] at no time subsequent to the divorce and before [the deceased's] death had an insurable interest in his life, it is unnecessary to determine whether that fact, of itself, was sufficient to divest her of any interest in the policy of insurance; *it is sufficient to place our decision, as we do, on the ground that she was divested of such interest by the judgment of divorce and the effect* [*Sec. 403.060 K.R.S.*] *compels us to give it.* (155 Ky. at 56, 159 S.W. at 624 (emphasis added))

Accord, Schauberger v. Morel's Adm'r, 168 Ky. 368, 182 S.W. 198, (1916); *Warren v. Spurlock's Adm'r*, 292 Ky. 668, 167 S.W.2d 858, (1943); *Salisbury v. Vick*, 368 S.W.2d 317 (Ky. Ct. App. 1963).

Bissell v. Gentry, 403 S.W.2d 15 (Ky. Ct. App. 1963), is the most recent case in which the Kentucky Court of

Appeals has construed § 403.060. It is identical to the present case in all importan respects. *Bissell* was an action by the insurance company to have the court resolve adverse claims by the divorced wife of the insured and the administrator of the insured's estate to the proceeds of a group insurance policy. During his lifetime the insured had become covered under the terms of a group insurance policy issued to the insured's employer. The named beneficiary of the accidental death benefits of the group policy was the insured's wife. Subsequently, the insured and his wife were divorced in Kentucky. No change in the beneficiary designation was made by the insured after the divorce. Eight years later the insured died. In line with the court's previous decisions, the court held that an absolute divorce in Kentucky bars the divorced wife's rights as a designated beneficiary of insurance policies on her husband's life. In explaining its holding, the court stated:

> This court has held consistently that the interest of a spouse as beneficiary comes squarely within the restoration provisions of KRS 403.060, and as a result, every right of a divorced party as beneficiary of a policy of life insurance on the life of the other is extinguished, except in cases where the policy on the life of one of the parties is obtained during marriage and the other paid the premiums during the marriage. In such case he or she is entitled to continue payments and receive the proceeds of the policy upon maturity.
>
> * * *
>
> There is a statement that neither [the deceased] nor his ex-wife paid any of the premiums on the policy in issue. It was a group policy furnished to [the deceased's] employer as part of the terms of his employment. The employment of [the deceased] was the only consideration for issuing this policy and paying the premiums necessary to keep it in force. The result is that it is as though [the deceased] individually procured and paid for the policy. (403 S.W.2d at 15-16)

Accordingly, the policy proceeds were held payable to the decedent's estate.

Petitioner concedes that Kentucky law is as set forth above. (Petition, 7) Our purpose, however, in citing and discussing these cases at some length is to highlight the proposition that is central to the resolution of this case: *One of the incidents of the decree of divorce which Petitioner sought and obtained from a Kentucky court was the extinguishment, by operation of law, of her expectancy in the accidental death proceeds of the group insurance policies which are the subject of this action.*

(b) The District Court Was Required By the Full Faith and Credit Clause, U. S. Const. Art IV, § 1, as Well as Established Principles of Conflict of Laws to Recognize and Give Effect to the Restoration of Property Order in Petitioner's Kentucky Divorce Decree.

Whether the judgment in favor of Respondent, Barbara G. Fields, Administratrix, rests upon the full faith and credit clause (as stated by the district court) or upon conflict of laws principles (as stated by the court of appeals), the judgment is entirely in accordance with established precedents.

An understanding of the following facts illustrates that this case is governed by the full faith and credit clause:

(1) Petitioner, while a citizen of Kentucky, voluntarily invoked the aid of a Kentucky court to terminate her marriage to Jan A. Fields;

(2) The divorce decree which Petitioner sought and secured contained an order requiring each party to restore to the other, property obtained from the other during the marriage and in consideration thereof, as required by § 403.065, K.R.S.;

(3) With specific reference to the accidental death proceeds under the group insurance policies, the clear unequivocal effect of the restoration of property order

as declared in an unbroken line of decisions from the Kentucky Court of Appeals is the extinguishment, by operation of law, of Petitioner's expectancy as the designated beneficiary of such proceeds; and

(4) The Federal District Court for the Eastern District of Kentucky was bound by the dictates of the full faith and credit clause to enforce the restoration of property order in Petitioner's Kentucky divorce decree. See 28 U.S.C. § 1738; *Davis v. Davis*, 305 U.S. 32, 40 (1938).

Indeed, we can conceive of no more appropriate case than this for the application of the full faith and credit clause. The adverse parties in this action are precisely the same as in the Kentucky divorce action—Petitioner and Jan A. Fields, through his personal representative. If Petitioner should prevail in this action, the restoration of property order in Petitioner's Kentucky divorce decree would be wholly vitiated, a consequence clearly forbidden by the full faith and credit clause. See, *e.g.*, *Scherrer v. Scherrer*, 334 U.S. 343 (1948); *Estin v. Estin*, 334 U.S. 541 (1948); *Holm v. Shilensky*, 388 F.2d 54 (2d Cir. 1968).

While it should be clear that, by virtue of the foregoing logic, full faith and credit considerations control the disposition of this case, the district court's judgment derives support of equal cogency from established principles of conflict of laws. Consider the court of appeals' analysis:

(1) The restoration of property order in Petitioner's Kentucky divorce decree represents an involuntary assignment by Petitioner to Jan A. Fields of her expectancy in the accidental death proceeds of the group insurance policies; *E.g.*, *New England Mutual Life Ins. Co. v. Spence*, 104 F.2d 665 (2d Cir. 1939);

(2) In considering this case, a Kentucky court using conflict of laws rules would apply Kentucky law (discussed above) to determine the effect of the restoration of property order on Petitioner's expectancy, not-

withstanding the fact that the group insurance policies provide they were to be construed according to Ohio law. *New England Mutual Life Insurance Co. v. Spence, supra;* Restatement (Second) *Conflicts of Laws* § 209 (1971); see Annot., 97 A.L.R.2d 1399, 1401;

(3) The District Court was exercising diversity jurisdiction and, accordingly, was required to give the restoration of property order the same effect a Kentucky court would give it.

Thus, both the full faith and credit clause and conflict of laws principles require a ruling that the restoration of property order extinguished Petitioner's expectancy in the accidental death proceeds of the group insurance policies. Accordingly, we refrain from burdening the Court with further discussion of legal theory and authority which compels a judgment in favor of Barbara G. Fields, Administratrix. Instead, we direct our attention to Petitioner's legal theories and the authorities cited in support thereof.

II. APPLICATION OF THE RESTORATION OF PROPERTY ORDER TO EXTINGUISH PETITIONER'S EXPECTANCY IN THE ACCIDENTAL DEATH PROCEEDS OF THE GROUP INSURANCE POLICIES DID NOT CONSTITUTE A VIOLATION OF THE DUE PROCESS CLAUSE.

Although Petitioner's argument is less than clear, we understand her theory to be that the divorce decree entered by the Kenton Circuit Court, the restoration of property order contained in that decree and the full faith and credit clause have nothing to do with this case; that the due process clause of the Fourteenth Amendment, U.S. Const. amend. XIV, § 1, forbids the application of the restoration of property order to extinguish Petitioner's expectancy in the accidental death proceeds of the group insurance

policies; and that the rights of the parties hereto are simply a matter of contract, to be governed by Ohio law.

Petitioner's due process argument is based upon two wholly inapposite cases, *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930) (Petition, 9-10) and *Hartford Accident & Indem. Co. v. Delta & Pine Land Co.*, 292 U.S. 143 (1934) (Petition, 10).

In *Dick*, plaintiff, a citizen of Texas, brought suit in a Texas state court to recover on a fire insurance policy issued to him in Mexico by a Mexican insurance company for a tug which was destroyed in Mexican waters. In rem jurisdiction was obtained through the garnishment of two United States companies which had reinsured the risk. The garnishees contended that the suit was time-barred becaues it had not been commenced within the one year period specified in the insurance policy. The plaintiff contended that the policy limitation was invalid under a Texas statute which declared such provisions to be unenforceable. The Texas courts held for the plaintiff and the garnishees appealed to the Supreme Court which reversed, holding that since "all acts relating to the making of the policy were done in Mexico" and since "all things in regard to performance were to be done outside of Texas,"

> Texas was, therefore, without power to affect the terms of contracts so made. Its attempt to impose a greater obligation than that agreed upon and to seize property in payment of the imposed obligation violates the guaranty against deprivation of property without due process of law. (281 U.S. at 408)

Similarly, in *Delta & Pine, supra*, the Supreme Court held that the application of a Mississippi statute to invalidate a limitation in a bond issued in Tennessee violated the issuer's rights under the due process clause.

The facts of this case contrast markedly with the facts of *Dick* and *Delta & Pine*. In no event can it be said that

the restoration of property order affected the contractual obligations of Travelers. Its liability is acknowledged and the proceeds of the group insurance policies have been deposited in the registry of the district court as required by 28 U.S.C. § 1335.

Only Petitioner is raising the question of due process. Yet it is clear that Petitioner's expectancy in the accidental death proceeds was extinguished by appropriate legal process when she voluntarily invoked the jurisdiction of the Kenton Circuit Court to dissolve a marriage contract and allocate the property interests of the parties to that contract. As stated by Circuit Judge McCree in the case below:

> Whatever may have been the nature under Ohio law of appellant's interest in the Travelers policies, the state of Kentucky had the power, because of its jurisdiction over appellant, to assert jurisdiction over that interest. . . . This is not a case of a state attempting, as in *Delta & Pine, supra*, "to draw to (itself) . . . . control over the obligations of contracts elsewhere validly consummated and to convert them for all purposes into (its) interests as contrasted with those created at the place of the contract. . ." 292 U.S. at 150. Kentucky has no interest in defining and construing the contractual obligations; it does, however, have a strong interest in ascertaining and dividing whatever property is possessed by its citizens who are properly before its courts in a divorce action. The Fourteenth Amendment does not require that the state, in adjudicating the division of this property, ignore its own laws and look to the law of each state in which rights to the property originated to determine the effect of the divorce upon those rights. (451 F.2d at 1299-1300) (citations omitted.)

In the context of this lawsuit, the terms of the group insurance policies are irrelevant. Despite Petitioner's attempted obfuscation, the issue is not whether Peti-

tioner was the designated beneficiary under the group insurance policies but whether, in light of the restoration of property order in the Kenton Circuit Court divorce decree, Petitioner is entitled to receive the proceeds of those policies. When Petitioner invoked the jurisdiction of the Kenton Circuit Court and consented to the entry of the decree containing the restoration of property order, she surrendered her expectancy in the proceeds of the group insurance policies. She may now regret the consequences of that voluntary act, but she cannot complain that her constitutional rights have been violated.

A careful analysis of *Morgan v. United States*, 315 F. Supp. 213 (E.D. Ky. 1969) (Petition, 12-13), discloses that it affords no more support to Petitioner's argument than do the other cases cited in her Petition. In *Morgan*, a National Service Life Insurance policy was issued by the United States to the insured, who named his then wife as the beneficiary. Thereafter, the insured and his wife were divorced in Kentucky and the insured subsequently died without having effected a change of beneficiary. Both the former wife and the decedent's estate claimed the policy proceeds. The court held that federal regulations and the policy provisions controlled the disposition of the proceeds and, accordingly, awarded the proceeds to the designated beneficiary.

Petitioner asks rhetorically: "Why is *Morgan v. United States* any different from this case?" *Morgan* involved a policy issued by the Federal government pursuant to the provisions of the National Service Life Insurance Act, 38 U.S.C. § 701 et seq. In construing that Act. this Court had held, in *Wissner v. Wissner*, 338 U.S. 655 (1950), that, "Congress has spoken with force and clarity in directing that the proceeds (of a National Service Life Insurance policy) belong to the named beneficiary and no

other," and that to permit any state policy to bring about a different result would frustrate "the deliberate purpose of Congress." 338 U.S. at 658, 659. Therefore, the issue in *Morgan* was "one involving the primacy of federal law." *Morgan v. United States, supra*, 315 F. Supp. at 215. As stated by the Sixth Circuit in the present case,

> These cases merely involve particular applications of the familiar principle that, where the purpose of a federal law requires subordination of state policy, the supremacy clause proscribes application of the state law embodying that policy . . . . There is, of course, no supremacy clause to mandate the primacy of the policy of one state over that of another state. . . . (451 F. 2d at 1296) (Citations omitted)

Thus viewed, the *Morgan* decision is of no assistance to Petitioner.

The remaining authorities cited by Petitioner are directed at two propositions: first, that the group insurance policies are "Ohio contracts" and Kentucky courts will enforce a contract made elsewhere even though the terms thereof conflict with the public policy of Kentucky, (*Clarey v. Union Central Life Ins. Co.*, 143 Ky. 540, 136 S.W. 1014 (1911); *Union Central Life Ins. Co. v. Barnes*, 175 Ky. 364, 194 S.W. 339, (1917) (Petition, 17-18); and, second, that, under Ohio law, Petitioner's interest in the group insurance policies was not affected by her Kentucky divorce decree. (Petition, 19-21).

Responding to Petitioner's contract argument, we remind the Court that this case does not involve the enforcement of a contract, the terms of which are in conflict with the public policy of Kentucky. The touchstone of this case is Petitioner's divorce decree which terminated her marriage and foreclosed her expectancy in the accidental death proceeds.

With regard to Petitioner's final contention, while it is true that an Ohio divorce (or a divorce obtained in a jurisdiction which has no restoration of property statute) does not terminate the wife's rights as a beneficiary under her husband's life insurance policies, there is no reason to believe that an Ohio court could reach a result in this case any different than the result reached by the district court. Petitioner has not cited, and we have not found, any Ohio decisions relating to the effect which a Kentucky divorce or a divorce granted in a state which requires a restoration of property has upon the right of a divorced wife to the proceeds of a life insurance policy. Indeed it is elementary that under such circumstances an Ohio court would be required to give full faith and credit to the sister state decree. See, *e.g.*, *Scherrer v. Scherrer*, *supra*; *Wood v. Wood*, 174 Ohio St. 318, 189 N.E.2d 34 (1963); *Armstrong v. Armstrong*, 117 Ohio St. 558, 160 N.E. 34 (1927). The district court so held. *The Travelers Ins. Co. v. Fields*, 323 F.Supp. 387, 390 (E.D. Ky. 1970).

III. THE DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS DOES NOT CONFLICT WITH THE DECISION OF THE SEVENTH CIRCUIT COURT OF APPEALS IN FEDERAL LIFE INS. CO. V. TIETSORT.

In her eleventh hour attempt to salvage her unmeritorious cause, Petitioner argues that the decision of the Sixth Circuit Court of Appeals, affirming the district court's judgment for the Respondent, is in conflict with the decision of the Seventh Circuit Court of Appeals in *Federal Life Ins. Co. v. Tietsort*, 131 F.2d 448 (7th Cir. 1942), *cert. denied*, 318 U.S. 768 (1943). Analysis of Judge Otto Kerner's opinion in *Tietsort* reveals that the purported conflict is an illusion, fabricated from dicta and speculation.

The basic distinction between this action and the *Tietsort* case is that *Tietsort* did not involve a restoration of property order. The holding of *Teitsort* is that, under Illinois law, the designation of a particular beneficiary under an Illinois insurance policy was not affected by an Illinois divorce. To speculate how the Seventh Circuit would treat a restoration of property order in an Illinois divorce decree is improper. To conclude that the Seventh Circuit would refuse to accept the validity of the restoration of property order in the Kenton Circuit Court's decree is patently erroneous.

To bolster her contention that *Tietsort* presents a conflict, Petitioner refers to what is now Ill. Rev. Stat. ch. 40, § 18 (1969) as a " 'restoration' statute, having in mind the same effect as that contemplated by KRS 403.060 and 403.065. . . ." (Petition, 23) In fact, Judge Kerner's opinion did not refer to that statute, which, by its terms, is permissive only, nor is there any indication that that statute was invoked in the Illinois divorce action which preceded the *Tietsort* case. In contrast, the applicable Kentucky statutes are mandatory, rather than permissive, and they were specifically implemented through the restoration of property order contained in the Kenton Circuit Court's divorce decree.

Although *Tietsort* may be instructive concerning the law of Illinois, the holding of that case is demonstrably not in conflict with the decision of the Sixth Circuit in this action, for the essential facts of the two cases are not the same. Accordingly, *Tietsort* does not provide a basis for granting the Petition for a Writ of Certiorari.

CONCLUSION

Petitioner has failed to show any basis for granting her Petition for a Writ of Certiorari. The deci-

sion of the Sixth Circuit Court of Appeals in this case is not in conflict with any decision of any other court of appeals. Nor is the decision of Sixth Circuit in conflict with any decision of this Court.

The controlling fact in this action is that when Petitioner sought and obtained an absolute divorce from Jan A. Fields in Kentucky her expectancy in the subject group insurance policies was extinguished by operation of the restoration of property order in her divorce decree. The decisions of the courts below in favor of Respondent, Barbara G. Fields, Administratrix, flow irresistably from this fact. We respectfully submit that the Petition for a Writ of Certiorari should be denied.

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